In the Supreme Court of the United States.

OCTOBER TERM, 1881.

THE NEWPORT AND CINCINNATI BRIDGE COMPANY, appellants,
vs.
THE UNITED STATES.
No. 32.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

THE NEWPORT AND CINCINNATI Bridge Company, appellants, *vs.* THE UNITED STATES. } No. 32.

BRIEF FOR THE UNITED STATES.

[The brief for the United States filed at the last term having been prepared without the advantage of a previous perusal of that of the appellants, the present brief is submitted in substitution therefor.]

This is a suit in equity against the United States, brought by permission of Congress, given by the act of March 3, 1871, sec. 5, 16 Stat., 572 (see *post*, p. 8).

A correct abstract of the pleadings is presented in the first fifteen pages of the brief for the appellants.

It is enough to say here that, under charters granted by the States of Kentucky and Ohio, in February and

April, 1868 (*consolidated* during the latter month), the plaintiffs, in October, 1868, let to contract the construction of a bridge across the Ohio River, at Cincinnati; that subsequently they applied to Congress for its consent thereto, and that this was given by resolution of March 3, 1869 (*post*, page 8), which authorized them, as one alternative, to construct a draw-bridge having a channel span of *not less than seventy feet above low-water mark;* that by the act of March 3, 1871 (as above), this authority was withdrawn, the bridge as then being constructed declared unlawful, and the plaintiffs authorized, in lieu thereof, to construct a bridge having an elevation of *one hundred feet;* that when this latter act was passed the plaintiffs had already made large outlays and much progress in constructing the bridge, and Congress thereupon also authorized them, in case they should make the changes required, to file a bill against the United States to determine, "first, whether the bridge, according to the plans on which it has progressed at the passage of this act, has been constructed so as to substantially comply with the provisions of law relating thereto, and, second, the liability of the United States, if any there be, to the said company by reason of the changes by this act required to be made"; that thereupon the "changes" were made, and this suit brought.

The claim is, that because of the changes so required the United States are liable to the plaintiffs for damages amounting to $557,450.48.

The above outline presents the main point in this case, which is whether, under the circumstances as stated by

the plaintiffs, the United States are in any respect *liable* to them pecuniarily.

However, it is to be added, that on behalf of the United States a question is made as to the validity of the license of 1869 for the purposes claimed by the plaintiffs. They also deny that the bridge according to the plans on which it had been constructed, had, at the passage of the act of 1871, so progressed as substantially to comply with the provisions of law relating thereto.

The facts and evidence relating to these latter questions are as follows:

First, as to the validity of the license of 1869, so far as it purports to authorize a bridge of *seventy feet* in height at the channel span.

It must be premised that the resolution of 1869, which adopts by reference thereto certain provisions in section 4 of the act of July 14, 1862 (given on page 108 of the Record), does in that way upon its face authorize, as one alternative, a bridge of seventy feet in height (Record, pp. 108, 109).

At that time, however, a contract for the construction of the bridge had been in existence for nearly five months, and this called for a channel span of 100 feet in height. (See allusion in the brief for appellants, p. 62, paragraph marked 2, in connection with the evidence of the three following witnesses, introduced by appellants.)

George A. Smith (folio 236).

Was contractor for, and had charge of, construction of masonry for the bridge from the beginning until its com-

pletion (folio 236); learned height of the bridge from plans, &c., shown by engineer in charge, about a month previous to the date of the contract, which was October 9, 1868; that height was to be 100 feet; all the agents of the company with whom he conversed agreed to that (folio 255); was first advised of change of plan to a 72-foot bridge about April 1, 1869; thereupon [*April* 15, folio 177] witness met the directors of the company, and after discussion a new agreement was made (folio 256).

John C. Wilson (folio 63).

Was engineer in charge of construction of bridge from autumn of 1868 until completion in autumn of 1872 (folio 63); contract with Smith appears in Exhibit A [on folio 45] (folio 64); on becoming assistant engineer in September, 1868, was shown by the chief engineer, Linville, a side elevation of a bridge, prepared for making a preliminary estimate of its cost (folio 71); this grade was 90 or 100 feet above low water (folio 72); a draw-bridge was not contemplated until March, 1869 (folio 74); his first notice thereof was by reception of plans at that date (folio 75); upon Smith's being notified thereof (April, 1869), he claimed that the original plan was for a *higher bridge*, &c., but the company contended that the diminution in height of the masonry was an equivalent for the reduction of thickness, &c., and at last the matter of a bonus on account of the change was agreed to be left to Mr. Thompson (folio 178).

Jacob H. Linville (folio 166).

Was the first chief engineer of the bridge (folio 166); in October, 1868, a bridge was contemplated having a

channel span of 100 feet in height (folio 167); the change to 75 feet was determined on in November, 1868 (folios 167, 168); the plan for a bridge of 100 feet high was made about August 25, 1868, and none other was made before contract with Smith & Co. (folios 171, 172).

[The above testimony throws light upon the assurance alleged to have been given by an agent for the company whilst soliciting the passage of the resolution of 1869, as detailed in the evidence of the four following witnesses, introduced by the United States.]

Benjamin Eggleston (folio 292).

Judge Headington, of Cincinnati, as attorney for the bridge company, pressed the passage of the resolution; he assured witness (then a member of Congress from Cincinnati) that the height of the bridge would be that of the suspension bridge at Cincinnati, *i. e.*, 100 feet above low-water mark; passage of resolution was opposed by parties from Pittsburgh and other river towns; but for such assurance as to the height of the bridge the resolution would not have passed.

J. K. Moorehead (folio 293).

Was member of Congress for Pittsburgh at time of passage of resolution of 1869; upon examination of it found that act of July 14, 1862, was made applicable to bridge, and thereupon objected; but yielded upon assurances from a committee of his constituents, and from Judge Headington who represented the bridge company, that the bridge should be as high as the suspension bridge at Cincinnati.

S. F. Cary (folio 296).

Was member of Congress for Cincinnati at time of passage of resolution of 1869; it was the subject of an exciting controversy, in which parties interested in the investigation of the river demanded that no bridge less than 100 feet high should be constructed; it was distinctly stated by Judge Headington, on behalf of this company, that it was proposed to make the bridge 100 feet high; that their plans, already determined upon, provided for such height; and that was the inducement upon which the resolution passed.

R. C. Gray (folio 275).

Was one of committee representing river interests at Washington during session of 1868; Judge Headington promised, for bridge company, that if committee would not oppose the resolution he would agree that the company should erect the bridge of same height as suspension bridge at Cincinnati.

So much as to the character of the license of 1869.

Secondly, as to the correspondence of the bridge so far as constructed in March, 1871, with the provisions of law in relation thereto: it is submitted for the United States that *the provision for the width of the channel span* was violated by *the obliquity of its piers to the current of the river;* and, also, *by faults in the foundations* of these piers, which rendered it necessary afterwards to apply riprap to them; the joint effect of these variations from the provisions of the law for a channel span of 400 feet

wide, being to reduce such channel for purposes of navigation to a width of 348.6 feet.

The evidence upon these points is given by the two witnesses following:

John C. Wilson (as above).

Current in the channel about five degrees out of the direction of the piers (folio 77); foundations of piers (constructed in 1870) not safe without ripraps to secure them against the scouring action of the water; ripraps placed there [3,500 perches of stone and *fillings*, folio 81] during 1871 (folio 78).

W. E. Merrill, witness for defendants (folio 276).

Major of engineers, U. S. A.; examined the bridge under orders of Secretary of War, as required by act of July 11, 1870 [which authorized the Secretary to detail three engineers to examine all bridges then erected or in process of erection across the Ohio, and to report to the next session of Congress whether any of such bridges will interfere with navigation; and, if so, what extent of span and elevation will be required to prevent obstruction, and at what cost (16 Stat., 227, see *post*, p. 16)]. Channel piers vary 12 degrees from course of current (folio 278); the imperfect character of foundations rendered ripraps necessary to prevent piers from being overturned; piers should have been founded on rock, in which case no ripraps would have been required (folio 289); ripraps were placed around piers some months after the completion of the bridge (folio 288); available space for navigation under the channel span, owing to ripraps and obliquity of piers, is 348.6 feet,

and this "would have to be further reduced if proper allowance were made for the obliquity of the axis of the bridge" (folio 289).

The resolution of March 3, 1869, and section 5 of the act of March 3, 1871, so important and so often referred to in the argument of this case, are as follows:

RESOLUTION OF 1869.

Be it resolved, &c., That the consent of Congress be, and the same is hereby, given to the erection of a bridge over the Ohio River from the city of Cincinnati, Ohio, to the city of Newport, Kentucky, by the Newport and Cincinnati Bridge Company, a corporation chartered and organized under the laws of each of the States of Kentucky and Ohio: *Provided*, That said bridge is built with an unbroken or continuous span of not less than four hundred feet in the clear, from pier to pier, over the main channel of the river, and is built in all other respects in accordance with the conditions and limitations of an act entitled "An act to establish certain post-roads," approved July fourteenth, eighteen hundred and sixty-two. That said bridge, when completed in the manner specified in this resolution, shall be deemed and taken to be a legal structure, and shall be a post-road for the transmission of the mails of the United States; but Congress reserves the right to withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge.

ACT OF 1871, SEC. 5.

That it shall be unlawful for the Newport and Cincinnati Bridge Company or any other company or person to proceed in the erection of the bridge now being constructed over the Ohio River from the city of Cincinnati, Ohio, to the city of Newport, Kentucky, and

the approaches thereto, unless the said bridge shall be so constructed that the channel span of four hundred feet, as now located, shall have under said span a clear headway at low water of one hundred feet below any point of said channel span, and in such case no draw shall be required in said bridge; all the other spans of said bridge, which cover the Ohio River at low-water mark, shall have a clear headway of not less than seventy feet above low-water mark; and the other spans of said bridge, extending to each shore, may be made of less elevation than seventy feet above low-water mark to accommodate a regular grade for the approaches to said bridge.

And when the foregoing requirements shall have been complied with by the said Newport and Cincinnati Bridge Company, the location of said bridge, its structures and approaches, shall thereupon be deemed to be legalized and declared to be lawful structures, and shall be recognized and known as a post-route.

The plans for changes in said bridge made necessary by this act shall be submitted by said company to the Secretary of War for his approval. And in the event of the bridge company making the changes provided for in this act, it shall be lawful for said company after they shall have made the changes in said bridge, and the approaches thereto, as herein provided, to file their bill in equity against the United States in the circuit court of the United States for the southern district of Ohio, and full jurisdiction is hereby conferred upon said court to determine, "First, whether the bridge, according to the plans on which it has progressed at the passage of this act, has been constructed so as to substantially comply with the provisions of law relating thereto; and, second, the liability of the United States, if any there be, to the said company, by reason of the changes by this act required to be made," and if the said court shall determine that the United States is so liable, and that the said bridge was so being built, then the said court shall further ascertain and determine the amount of the actual and necessary cost and expenditures reasonably required to be incurred in making the changes in the said bridge and its approaches, as hereby authorized or required, in excess of the cost of building said bridge and approaches according to the plan proposed before the changes required by this act to be made.

And the said court is hereby further authorized and required to proceed therein to final decree, as in other cases in equity. And it shall

be lawful for either party to the said suit to appeal from the final decree of the said circuit court to the Supreme Court of the United States, as in other cases, and the Supreme Court shall thereupon proceed to hear and determine the said case, and make a final decree therein, and thereupon, if such decree shall be in favor of said company, the Secretary of the Treasury of the United States shall, out of any moneys in the Treasury not otherwise appropriated, pay to the said company such sum of money as shall, by the said Supreme Court, be so decreed to be paid to the said company; provided, nevertheless, that no money shall be paid by the Secretary of the Treasury to the said company until the Supreme Court of the United States, upon appeal taken as aforesaid, shall render a final decree in the case in favor of said company.

The learned counsel for the appellants, in their excellent and elaborate brief, contend, substantially, that the question of the "*liability*" of the United States here is to be decided upon grounds of *natural right* or "*superior justice*"; and that upon these grounds, all interference whatever by the United States with private property, unless by due process of law, implies a corresponding obligation to indemnify for any pecuniary loss thereby occasioned; and further, that there is nothing in the quality of such obligation to prevent courts from taking cognizance thereof, so that whenever these obtain jurisdiction *as to parties*, whether by the Constitution or by a statute, it is their duty to enforce the indemnity.

As for the secondary matters at issue, as above; they assume that the company has performed all statutory conditions precedent to a right to recover; and they deny that fraud upon the legislature can be made out by the sort of evidence which for that purpose appears upon the record.

Upon the other hand, it is submitted on behalf of the United States that whilst there is one class of transactions by them which give rise to obligations that for

judicial cognizance need only a grant of jurisdiction *as to parties*, there is also another class out of which such obligations do not arise; and as to which, therefore, a court having jurisdiction as regards parties will pronounce that the questions remaining are of a character beyond its constitutional cognizance, or at all events are such as require that the political department shall have admitted *liability* by the United States on that account before the consequences thereof can be judicially ascertained.

As to the *secondary* questions, it is also submitted that certain conditions, as regards the construction of the bridge, *i. e.*, the width of the channel span, &c., which the act of 1871 makes *precedent* to recovery in this action, have not been performed by the company; and, moreover, that the violation by them of the assurances given by their agent, while soliciting the passage of the resolution of 1869, prevents the company (at all events *under that natural law* necessarily invoked by them to support their present contention) from setting up a subsequent statutory compulsion *to fulfill such assurances*, as ground of injury and damage. As incident to this latter point, it will be argued that whatever consequences would follow such *malâ fide* conduct in negotiations preliminary to grants of rights by other departments of the government, must follow it equally where the grant to which it is incident is by Congress.

1. I proceed to inquire into the "liability" *at bar* of the United States because of the act of 1871.

It is elementary learning that even where there is jurisdiction as to parties, *damage* alone does not author-

ize a suit; there must be *damnum cum injuria;* that is, not only a damage, but also, as Lord Hobart says (267 *a*), "a thing *done amiss.*" The main question here is as to the existence of *injuria.*

A. In this connection I submit, in the first place, that the statute of 1871 (*ante*, p. 8) creates no new principle of *obligation* upon the part of the United States because of their dealings with this bridge; in other words, that the positive or remedial character of that statute is confined to the provision which confers upon a court jurisdiction of the *contention;* another clause therein, *i. e.*, "if any there be," expressly instructing such court to inquire, upon the footing of the law already existing, whether there were any *basis* for such contention, *i. e.*, any *liability* by the United States.

That inquiry depends upon the construction to be given to the resolution of 1869 (*ante*, p. 8).

This authorized a draw-bridge with a channel span of 70 feet high, unless it should turn out that such height substantially obstructed free navigation, in which case Congress reserved a right to withdraw its assent, or to direct modifications.

Upon this it is said that the existence of the fact of *obstruction*, which alone was to justify the exercise of the right reserved to Congress, is a matter to be ascertained only in the way usual where questions of fact affect matters of business, that is by *action in court;* and, therefore, as no such ascertainment had been effected here, the provisions of the act of 1871 were un-

constitutional, so far as they purported to render the bridge unlawful; that the case was one in which the bridge could not have been *taken* except upon payment of an equivalent, and consequently, that the act in its earlier provisions, *i. e.*, for prohibition, necessarily anticipated *a liability on the part of the United States* upon that account; and this liability it went on subsequently to recognize by the provision for the suit now pending.

Upon the contrary, I submit that it appears evident, from the reason of the thing, that *Congress* was itself to determine the existence of this preliminary fact—*obstruction.*

If the matter so to be ascertained had been a question of *wrong*, or *abuse*, it might have been admitted that this should be ascertained through the medium of a court. But in fact, such matter was, *whether a constitutional act of Congress operated beneficially or otherwise.* Plainly, a court could not determine *that:* as plainly, *that* was a matter to be determined by legislative instrumentality alone. The case is that Congress had supreme power to declare what, in point of law, are or are not obstructions to navigation in the Ohio River, and that in the exercise of such power it had declared that until otherwise ordered a bridge of 70 feet high would not be such an obstruction. Supposing such a state of things, is there any *judicial* power any where to determine the question which Congress had required to be determined before it legislated further? Could any *court* decide that a bridge erected, to use the words of the provision under discussion, *by authority of a* [valid] *resolution of Congress* is *a substantial and material obstruction of free navigation?*

This is the very point in the cases of the Wheeling

Bridge (18 Howard, 421), the Clinton Bridge (10 Wall. 454), and South Carolina *vs.* Georgia (93 U. S., 4). I quote from the opinion delivered by Mr. Justice Strong in the case last named (p. 12):

"Upon this subject the case of Pennsylvania *v.* The Wheeling and Belmont Bridge Co. (18 How., 421), is instructive. There it was ruled that the power of Congress to regulate commerce includes the regulation of intercourse and navigation, and consequently the power to determine what shall or shall not be deemed, *in the judgment of law*, an obstruction of navigation. It was, therefore, decided that an act of Congress declaring a bridge over the Ohio River which in fact did impede steamboat navigation, to be a lawful structure, and requiring the officers and crews of vessels navigating the river to regulate their vessels so as not to interfere with the elevation and construction of the bridge, was a legitimate exercise of the power of Congress to regulate commerce."

I submit, then, that where (as here) the matter to be decided before further legislation is competent, is whether THE USE of certain privileges granted by a valid statute works public harm, the case differs in principles from one in which that matter is, whether there has been an ABUSE or VIOLATION of those privileges. Such as this latter are the cases cited upon the brief of the learned counsel, pp. 137, 139. (Baltimore *v.* Connellsville Railroad Company, and Flint *v.* Woodhull.) The former question is *legislative* in character, the latter, generally, *judicial*. A technical way of demonstrating that in the former case a court could have nothing to go upon—that is, would be asked to discuss a mere *moot point* (which courts never do)—is to consider that no possible plaintiff could show *injury* to himself by such bridge.

The full power of this argument is to show that Congress *could not* have referred such an inquiry to a court

of justice. The conclusion is of course *a fortiori* against an interpretation *that by indefinite language it intended to do so!*

If what has been now said upon this topic be well founded, I submit further that this court will presume (*omnia rite acta*) that the withdrawal of assent and the direction of modifications by the act of 1871 was in consequence of a previous ascertainment by Congress, in some way satisfactory to itself, of the existence of an *obstruction*. I shall also submit without further elaboration, *that in finding the existence of an obstruction, Congress was not bound to wait until the bridge was actually complete. Existence* for purposes of prudent legislation need not be so absolute as for judicial purposes; and even for the latter an *inchoate* existence is often sufficient. The question is what Congress intended by the resolution contained in the resolution of 1869. Its own practical construction thereof is evidence of that intention, and is reasonable.

The *presumption* just mentioned accords with what appears upon the records of Congress.

The act of July 11, 1870, sec. 5 (16 Stat., 227), already cited in connection with Major Merrill's evidence, provides:

> That the Secretary of War is hereby authorized and required to detail three engineers, whose duty it shall be to examine all bridges now erected, or in process of erection, across the Ohio River, and to report whether, in their opinion, such bridges, or any of them, as now constructed, or proposed to be constructed, do or will interfere with the free and safe navigation of said river; and if they do or will so interfere, to report also what extent of span and elevation

above water will be required to prevent obstruction to navigation, and their estimate of the cost required to change such bridges now built, or being built, to such width of span and elevation above the water as will prevent obstruction to navigation, such report to be made and communicated to the next session of Congress.

Thereupon the Board of Engineers so ordered made an elaborate report to Congress (December 21, 1870), which was summed up in an expression of opinion "that this bridge as being constructed is a serious obstacle to the free navigation of the Ohio River, and that it importunately calls upon Congress to exercise its specially reserved right of modification." (See No. 32, in the volume entitled, Ex. Doc. Nos. 19 to 60, third session Forty-first Congress, 1870–'71.)

The act of March 3, 1871, was responsive to this recommendation, and, as is apparent, was passed at the same session.

It follows that the legislation of 1871, so far as it declared the bridge unlawful, and directed modifications, being in pursuance of an authority duly reserved to Congress, was not only competent, but was in discharge of a public duty!

It is said that in declaring a further prosecution of the bridge *unlawful*, the act of 1871 went beyond the allowance of the resolution of 1869 which reserved no more than a right of *withdrawing consent*, the effect of which, as is said, would have been to leave the bridge to its chartered rights under the legislation of Kentucky and Ohio. This seems to be a narrow view of the question. In substance, the declaration went no further than

the reservation. "Unlawful" does not mean "criminal," for the old bridge in a complete condition could not, by virtue of such Congressional declaration, have formed the subject of an indictment in either Kentucky or Ohio, or in a court of the United States; or if otherwise, this would have been because it was built *without consent* of Congress, *i. e.*, because the mere absence of such consent would have made it unlawful, or, in other words, because the actual declaration made by Congress is no more than an exercise of the power reserved, or equivalent to what was reserved. In the mean time, of course, no criminal proceeding could be taken in the United States courts, nor any other special proceeding, as is conceived, unless expressly directed by Congress. The absence of any such direction here going further to show that by "unlawful" Congress meant "unconsented to."

In this general connection I may observe that the right of modification seems to stand upon stronger reason than that which was sanctioned by this court in the cases, Railroad *v.* Richmond (96 U. S., 521) and Fertilizing Company *v.* Hyde Park (97 U. S., 659).

Lastly, in view of the powers reserved by Congress it is evident that there has been no interference with *vested rights*. Congress in effect reserved the power to forbid *further proceeding* with the bridge. This is all that it has actually done. It has left the erections already made—the stone dressed and iron purchased, whatever their value may be—to the company. This is in accordance with the principle of the cases upon this topic cited upon the brief for the plaintiffs (pp. 71, &c.). If those erections and that stone and iron were

hus deprived of whatever *special value* they had, *i. e.*,—their value in connection with the bridge, which may have been nearly their total value,—the right to this, under the terms defining what was reserved, was not *vested*.

Upon the whole, therefore, I submit that the United States are not judicially liable to the plaintiffs on account of the changes directed by the act of 1871. And if not *judicially* liable, I understand that the question of liability of any sort in this suit is yielded by the plaintiffs.

B. As a distinct ground of defense, I also submit that Congress in fixing the width of the channel span at 400 feet, intended that substantially there should be a *water-way* under that span of like width. Something of course was to be allowed for such slope of piers as experts might pronounce proper, but not for compensation of a foundation *originally bad* (see Merrill's evidence, *ante*, p. 7) by ripraps sensibly diminishing the water-way, or by piers making an angle with the current; each defect contributing here towards a contraction of the channel amounting to 13 per cent., leaving a water-way of only about 348 feet wide. The act of 1862, in requiring the piers to be "parallel with the current of the river as near as *practicable*," referred, as I submit, to practicability *in engineering*, and not to *pecuniary* practicability, as is contended by the plaintiffs (brief, p. 61). Pecuniary practicability is a very indefinite element in such matters. It often depends upon circumstances that Congress would hardly take into account; and conceivably might

lead to an entire abandonment of any condition to which it may be attached.

As regards the want of conformity of the piers to the current, it will be borne in mind that under the act of 1862, this is also a *substantive* objection to the bridge, besides being, as above, contributory to the defect in the channel span.

It is upon these grounds that I submit that the Company has not fulfilled the conditions precedent to recovery in this suit as required by the act of 1871.

C. If the disregard by the company of the assurances given by their agent as to the intended height of the bridge, at the time that the resolution of 1869 was pending, cannot be considered by the court, it is because certain technical difficulties render grants by Congress less secure against fraud than grants by other departments of the government. In private legislation like this, which is naturally made a matter of *promotion* upon one side and *objection* upon another, and with regard to which the views of the promoters and opposers naturally have great weight with the legislature, it does seem that representations made by such parties to each other under the circumstances mentioned above, ought to have consideration:—at least in any subsequent litigation set on foot by the one who made the representations, in any court specially requiring from its suitors *clean hands*.

The question is not as to *Judge Headington's* probity or veracity but, as to the subsequent failure of the Com-

pany, his principal, to observe terms which a gentleman whose word was justly so much relied upon had made. The higher the character of the man put forward to represent them, the greater is the deception occasioned by the non-observance of his stipulations.

Several things conspired upon this point to render *inadvertent* the opposers and such Congressmen as were particularly cognizant of the matter. These were not only Judge Headington's repeated assurances, but that *he* had as sponsors the facts:—that the bridge had for several months already been let to contract; that it was so let as 100 feet high; and that this height had been fixed upon notwithstanding that the Ohio charter had allowed—just as the proposed legislation was to allow—the company to erect a bridge of 70 feet in height (Record, folio 139.)

When the duties of the United States in point of *morals* and *natural law* make, as necessarily here, so distinguished a figure in the case of the plaintiffs, it seems not impertinent to inquire whether in point of *morals* and *natural law* the duties of the plaintiffs have in the same connection been faithfully observed.

Recent constitutions condemn some sorts of legislation effected "by reference to titles" only of preceding statutes. There is an appearance of slyness about such proceeding. Members of the legislature are thereby insufficiently advised of the action proposed to them—especially in matters of mere *detail* sometimes of an interest merely *local*. (Cooley, Const., 183.) Whatever it may be in the power of a court to do in the way of redressing matters of this sort especially in an extraordinary suit like the present, one cannot help wishing for that "superior

justice" spoken of by Blackstone, to the effect that a private statute "hath been relieved against when obtained upon fraudulent suggestion." (Comm., 2d, 346.) So far as appears here, the same persons remain interested in the bridge who were so when the act of 1869 was solicited by their agent. *No mere surmise of subsequent transfers of interest for value without notice can prevail to prevent the enforcement of equities against the company.*

In conclusion, *it seems that in no case could a company situated as is this one properly claim compensation beyond the difference, if any, between the actual cost of the bridge at its final elevation, and what it would have cost at that elevation if such had been the original requirement of the resolution of* 1869. *For that the bridge ought never to have been less than* 100 *feet high must be taken for granted; such being the "judgment of law" in the case. The effect of the calculations upon which is based the large sum here claimed of Congress is to compel the United States to assist in building a private bridge in which it has no pecuniary interest.*

[An interesting discussion of the act of 1871 whilst pending in Congress may be found in the Congressional Record for 1870–'71, Part 3, pp. 1725 &c., 1738 &c., 1745 &c. This was in the Senate. There was no discussion in the House.]

S. F. PHILLIPS,
Solicitor-General.

o